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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 228

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, and MARKET PHARMACY COMPANY, INC., *Petitioners,*

v.

THEODORE BRITTON, Deputy Commissioner, District of Columbia Compensation District, Bureau of Employees' Compensation, United States Department of Labor, and EVELYN MORTON, individually and as mother and next friend of SHIRLEY ANN HARRIS MORTON, and PEARLINE MORTON, minor children, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN FLATHER ELLIS
Counsel for Petitioners
1319 F Street, N.W.
Washington 4, D. C.

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STATUTE INVOLVED

Longshoremen's and Harbor Workers' Compensation Act (Act. Mar. 4, 1927, ch. 509, 44 Stat. 1424, as amended, 33 U.S.C. sec. 901 et seq. 3

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

National Union Fire Insurance Company of Pittsburgh, Pennsylvania, and Market Pharmacy Company, Inc., the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on March 23, 1961.

OPINIONS BELOW

The opinion and order of the Circuit Court of Appeals for the District of Columbia Circuit is unreported and is printed in Appendix A hereto, infra, page 19a. The order of the United States District Court for the District of Columbia is printed in Appendix A hereto, infra, at page 2a and the opinion of that court is printed in Appendix A hereto, infra, at page 3a. The Compensation Order and Award of Death Benefits made by Respondent Britton, the deputy commissioner, is printed in Appendix A hereto, infra, at page 12a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 23, 1961 (infra, App. A, p. 19a). Rehearing was denied on April 13, 1961 (infra, App. A, p. 1a). The jurisdiction of the Court is invoked under Section 1254(1) of Title 28 of the United States Code.

QUESTION PRESENTED

The question presented for the consideration of the Court is whether the Court of Appeals erred in sustaining the District Court's decision that the deputy commissioner had properly found that a valid common law marriage existed between Respondent Evelyn Morton and the deceased employee at the time of the latter's injury and resulting death on the basis that such finding does not lack support by substantial evidence on the record considered as a whole when that record contains a finding by the deputy commissioner entirely inconsistent with the existence of a common law marriage, also contains other undisputed evidence showing that Respondent Evelyn Morton had denied that the deceased employee was the father of either of her two children, the "substantial evidence" involved was evidence of cohabitation and reputation, and the question before the

Court of Appeals was whether the finding that a common law marriage existed was correct in law.

STATUTE INVOLVED

Longshoremen's and Harbor Workers' Compensation Act (Act Mar. 4, 1927, ch. 509, 44 Stat. 1424, as amended, 33 U.S.C., Sec. 901, et seq.)

Sec. 902, Definitions.

* * * * * * *

"(16) The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

* * * * * * *

Sec. 921, Review of compensation orders.

* * * * * * *

"(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or the United States District Court for the District of Columbia if the injury occurred in the District.)"

STATEMENT

John P. Morton, an employee of the Market Pharmacy was injured in the scope of employment on July 2, 1958, and died as a result of his injuries on July 15, 1958 (infra, App. A, pp. 1a-2a). Subsequently, Respondent Evelyn Morton made a claim against the employer for death benefits under the Longshoremen's and Harbor Workers' Compensation Act, supra, as made applicable in the District of Columbia (infra, App. A, p. 14a), and a hearing was held at which among other things, the existence of a marital relationship between Evelyn Morton and the deceased employee was

contested (infra, App. A, p. 4a). At the hearing there was introduced evidence of cohabitation and reputation as to the existence of a common law marriage (JA 90, 104, 107, 108, 115). Evidence also was introduced tending to controvert such claim and Respondent Evelyn Morton, then claimant, was cross examined and testified directly concerning such evidence (JA 91-104). Her own testimony is that she and deceased commenced living together in Charlottesville, Virginia, in 1941, and that while so doing they entered into a private agreement to consider themselves husband and wife (JA 92-93, 102). In about 1943 or 1944, they moved to the District of Columbia, where, as was found by the deputy commissioner;

> "* * * some time between the conception and birth of Shirley Ann Harris Morton the mother of Evelyn Morton, Pearl Henrietta Harris, asked the employee and Evelyn Morton to allow her to adopt the expected child, and this request was joined in by one Crawley Rogers with whom the said Pearl Henrietta Harris was then living; that when the child was born the said Evelyn Morton had it registered with the vital statistics authority as the child of Crawley Rogers and Evelyn H. Harris, her own maiden name * * *" (infra, App. A, p. 16a).

That child was born on June 18, 1946, in the District of Columbia (JA 94). Shortly thereafter, Respondent Evelyn Morton (hereafter referred to as Evelyn) testified, she and deceased moved from the District to Maryland (JA 95). While in Maryland, she filed a supplemental birth affidavit naming the child born to herself and Crawley Rogers as Shirley Ann Harris, reiterating that her own surname was Harris (JA 103). Nothing in the record indicates that the name of that child ever was changed to Morton. After residing in Maryland for some five years, Evelyn testified that she and deceased returned to the District of Columbia (JA 96), for two years after which they returned to Maryland (JA 96), where Evelyn continues to reside (JA 91).

In 1952, Evelyn had told the public authorities in Maryland that she had no one to help her with her bills (JA 101, 135, 138). After returning to Maryland in 1954, she applied for public assistance giving the surname of her first child as Harris (JA 134, 137). In 1956, she did not know where deceased was living (JA 96). On occasion, she has denied that her other child was fathered by the deceased employee (JA 104).

REASONS FOR GRANTING THIS WRIT

The finding that a common law marriage existed violates the rule laid down by this Court in Travers v. Reinhardt, 205 U.S. 423, 51 L. ed. 871, 27 S. Ct. 567, that the parties must live together "constantly and openly," "holding forth to the world" that they are husband and wife.

One of the deputy commissioner's findings of fact, that the parties to the alleged marriage agreed that their first child was to be considered the child of another man and the action of Evelyn in subsequently registering that child as the child of that other man and herself as Evelyn Harris rather than Evelyn Morton, is a complete public disavowal of any marital relationship between the parties hereto. A fundamental consideration in this Court's decision in *Travers* v. *Reinhardt*, supra, was the uniform openness and consistency of the relationship between the parties (205 U.S. 442). Therefor, the finding in the present case by the deputy commissioner that, in connection with the birth of Evelyn's first child, the parties denied the existence of any marital relationship between them shows that his finding that such a relationship existed is an error of law.

Further, an analysis of the evidence, viewed in the light most favorable to Evelyn, shows that, under the law of the various jurisdictions where the parties to the present relationship lived from time to time, no marital relationship could have come into being between them.